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In the

Supreme Court of the United States

October Term 1959

No. 694

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. STONE,

Petitioners

v.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Argument	4
The District Court Has Power Under Rule 60(b) to Vacate a Portion of Its Own Judgment Under the False Claims Act	4
Conclusion	10

TABLE OF CITATIONS

Cases

Bradburn v. McIntosh, 159 F. 2d 925, 933 (10th Cir. 1947) 8

Fleming v. Mante, 10 F. R. D. 391 (N.D. Ohio 1950) 9

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 (1943) 6

Johnson v. First National Bank, 223 F. 2d 31 (10th Cir. 1955) 8

Klapprott v. United States, 335 U. S. 601 (1948) 4, 6, 8, 9

Patapoff v. Vaill-telt's Inc., 207 F. 2d 863 (9th Cir. 1949) 9

Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514 (3rd Cir. 1948) 5

Tucker v. American Surety Co., 191 F. 2d 959 (9th Cir. 1951) 5

United States v. McNinch, 356 U. S. 595 (1958) 4

Zimmern v. United States, 298 U. S. 167 (1936) 5

Statutes

Page

Sections 3490 and 5438, Revised Statutes of 1878, 12 Stat. 696, 698 ..... 2, 3

Miscellaneous

49 C. J. S., Judgments, Section 229 5

Rule 46(f)(2), Federal Rules of Criminal Procedure 7

Rule 60(b), Federal Rules of Civil Procedure 2, 4, 5, 6, 7, 8, 9

55 Yale L. J. 623 (1946) 6

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on December 14, 1959.

OPINIONS BELOW

The opinion of the court of appeals in this case (A. 12-20; R. 43-51) is not reported as yet. The opinion of the United States District Court for the Eastern District of Virginia is reported at 175 F. Supp. 811 (E. D. Va. 1959) (A. 2; R. 26).

The opinion of this Court on its previous consideration of this case upon a different point is reported at 356 U. S. 595 (1958).

JURISDICTION

The judgment of the court of appeals in this case was entered on December 14, 1959 (A. 20-21; R. 53). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). On January 11, 1960, the court of appeals entered an order staying the mandate of that court for a period of 30 days from that date (R. 54).

QUESTION PRESENTED

Does a district court under Rule 60(b)(6) of the Federal Rules of Civil Procedure have power for a proper cause to remit a portion of its own judgment for forfeitures under the False Claims Act, Sections 3490 and 5438, Revised Statutes of 1878, 12 Stat. 696, 698?

STATUTES INVOLVED

Rule 60(b), 28 U. S. C.:

"(b) *Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judg-

ment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of Section 5438, Title 'Crimes', shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the cost of suit; and such forfeiture and damages shall be sued for in the same suit."

STATEMENT

On July 31, 1956, the United States District Court for the Eastern District of Virginia entered a judgment against petitioners herein in the amount of $60,000 based on 30 forfeitures under the False Claims Act. This judgment was

reversed by the United States Court of Appeals for the Fourth Circuit, 242 F. 2d 359 (4th Cir. 1957), and this decision in turn was reversed by this court, sub nomine, *United States* v. *McNinch*, 356 U. S. 595 (1958), and the case remanded to the court of appeals. After a decision on remand to the court of appeals, 263 F. 2d 697 (4th Cir. 1959), and a further petition for a writ of certiorari to this Court which was denied, 359 U. S. 989 (1959), the mandate of the court of appeals was sent down to the district court (A. 1; R. 24). On motion of petitioners (A. 2; R. 25) the district court on July 31, 1959, ordered the remission of $40,000 thereof upon payment by petitioners of $20,000, which payment petitioners have made (A. 11-12; R. 35-36).

REASONS FOR GRANTING THE WRIT

The Court of Appeals by its decision has unduly restricted the scope of Rule 60(b)(6) and has rendered a decision apparently in conflict with the decision of this Court in *Klapprott* v. *United States*, 335 U. S. 601 (1948).

ARGUMENT

The District Court Has Power Under Rule 60(b)(6) to Vacate a Portion of Its Own Judgment Under the False Claims Act.

By its decision the lower court prohibits the granting of relief under Rule 60(b)(6) in any case in which a judgment is based upon a statutory forfeiture provided by Congress. According to the opinion, this Court lacked power to grant such authority to a District Court under Rule 60(b)(6), since such power would involve the exercise of a substantive right not existing prior to the promulgation of Rule 60(b)(6) by this Court.

It is important to note that the court of appeals did not decide that the motion had been improvidently granted because of insufficient grounds; rather, it decided that the district court had no power to entertain the motion even if proper grounds were shown. This decision, petitioners contend, is error.

Subsection 6 of Rule 60(b) neither creates nor alters any substantive rights of the parties to a suit, and as interpreted by the district court is not in contravention of 28 U. S. C., Section 2072, as held by the court of appeals. The right of a federal court to vacate its judgment is one which existed at common law and Rule 60(b)(6) merely provides a method for giving effect to this substantive right.

As Mr. Justice Cardozo pointed out for this Court in *Zimmern* v. *United States*, 298 U. S. 167 (1936), at common law a trial judge: ". . . had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether." 298 U. S. at 169-170.

The leading text authority on the subject, I Freeman on Judgments, Section 194, 375-377 (5th Ed.), states that the power to vacate judgments is conceded to all courts and is a power inherent in all courts of record independently of statute. The author states at page 375: "The practice in the different states is, in many respects, so conflicting that few rules can be laid down as universally applicable. One rule is, however, undoubted. It is, that the power of the court over its judgments during the entire term in which they are rendered is unlimited." See *Tucker* v. *American Surety Co.*, 191 F. 2d 959 (9th Cir. 1951); *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3d Cir. 1948); 49 C. J. S., Judgments, Section 229.

While at common law this power of a court lapsed at the end of the term in which the judgment was entered, it is

equally well recognized that even after term a court had inherent power to alter its judgment. As Mr. Justice Black said for this Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1943) at pp. 244-245:

> "From the beginning there has existed along side the term rule the rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.
>
> * * *
>
> "But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term in which it was entered had long since passed away." See also *United States* v. *Jordan*, 186 F. 2d 803 (6th Cir. 1951).

All that Rule 60(b)(6) has accomplished is to simplify the method of exercising this existing power to vacate. See Moore & Rogers, Federal Relief from Civil Judgments, 55 Yale L. J. 623 (1946).

After adoption of this rule the necessity for a bill of review, a bill in the nature of a bill of review, and the writs of coram nobis, coram vobis and audita querela used at common law passed away.

Lest there be any question concerning the power of a trial court under Rule 60(b)(6) all doubt was put to rest by the decision of this Court in *Klapprott* v. *United States*, 335 U. S. 601 (1948), in which this Court forthrightly stated as follows, at pages 614-615:

> "Thus we come to the question whether petitioner's undenied allegations show facts 'justifying relief from

the operation of the judgment.' It is contended that the 'other reason' clause should be interpreted so as to deny relief except under circumstances sufficient to authorize relief under the common law writs of coram nobis and audita querela, and that the facts shown here would not have justified relief under these common law proceedings. One thing wrong with this contention is that few courts ever have agreed as to what would justify relief under these old remedies. To accept this contention would therefore introduce needless confusion in the administration of 60(b) and would also circumscribe it within needless and uncertain boundaries. *Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple english, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.*" (Emphasis added)

Out of this clear statement of the meaning of Rule 60(b)(6) the court of appeals in this case has wrested a limitation to the effect that the rule shall not apply in any case in which the judgment vacated is based on a statutory penalty established by Congress. No authority is cited for this proposition and as far as petitioners have been able to discover none is available. As the district court noted, 175 F. Supp. 814, 815, the authority spelled out in Rule 60(b) is similar in civil cases to the authority given by Rule 46(f)(2) of the Federal Rules of Criminal Procedure in criminal cases, especially in civil forfeiture cases.

The court of appeals did not question the propriety of the conclusion of the district court that justice required the granting of the motion under Rule 60(b)(6). The opinion of the district court cannot be read without concluding that

the district judge, who saw the witnesses and tried the case without a jury, was convinced beyond peradventure of a doubt that a grave injustice would result from enforcement of the judgment as entered (R. 28, 32-34). This being true, under the decision of this Court in the *Klapprott* case the district court had ample authority, exercisable under Rule 60(b)(6), to entertain and grant the motion.

What the court of appeals failed to appreciate is that the relief given under Rule 60(b) in this case did not in any way directly reflect upon the correctness of the amount of the original judgment. Full scope was accorded the provisions of the False Claims Act on entry of the judgment. The act of the district court in granting the motion was in the nature of granting relief in equity against the judgment, since it merely restrained the government from collecting more than a certain amount of the judgment but did not directly impugn the judgment itself. As the court pointed out in *Bradborn* v. *McIntosh*, 159 F. 2d 925, 933 (10th Cir. 1947), in discussing the power of a court over its judgment in an equitable proceeding to attack the judgment: "The mandate of the court of equity does not operate upon the judgment itself. The decree grants relief against the consequences of the judgment. It adjudges the rights of the parties *inter se in relation to the judgment* and is directed to the parties only, or, if necessary, to the executive officers of the law, and operates in personam upon such persons or officers." And again in *Johnson* v. *First National Bank*, 223 F. 2d 31 (10th Cir. 1955), the court points out at page 34:

> "Even in the presence of extrinsic fraud, federal equity jurisdiction does not act upon the judgment assailed. It will act rather upon the successful parties to deprive them of the fruits of their fraudulent acts which operated to procure the judgment."

Here then, the effect of the granting of the motion by the district court was not to assail the validity of the original judgment but merely to prevent the execution of that judgment beyond the amount of $20,000. Quite simply, the trial court, regardless of the equities of the case, was required by the False Claims Act to enter a judgment for $60,000.00; this Act could not, however, destroy the inherent power of the same court to prevent enforcement of such a judgment in order to prevent injustice.

From the decision of this court in the *Klapprott* case it is clear to petitioners that the scope of the rule makes no distinction based on the underlying statute or common law rule on which the original judgment is based; as pointed out in 30 Am. Jur. 608, Judgments, Sec. 635: "So far as the nature or character of judgments is concerned, there is ordinarily no difference between them with respect to the power to set them aside." The 9th Circuit states in *Patapoff v. Vallstedt's Inc.*, 267 F. 2d 863 (9th Cir. 1959), at page 865 that Rule 60(b) is "clearly designed to permit a desirable legal objective" and empowers a district court to vacate a judgment in order to "accomplish justice".

In *Fleming v. Mante*, 10 F. R. D. 391 (N. D. Ohio 1950), the court set aside a treble damage rent control judgment on condition that the government accept single damages. In so far as conflict with a statutory enactment is concerned the question in that case would appear to be the same as the question in this case. Assuming damages, the plaintiff was entitled to have thrice the amount of damage awarded. Here, assuming false claims the government was entitled to have $2,000 for each one. To say that one could be set aside in a proper case but not the other is to encompass a broad rule designed to promote justice within a straight-jacket of formalism.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February ...., 1960

APPENDIX

TABLE OF CONTENTS

	Page
MANDATE	1
MOTION BY DEFENDANTS TO VACATE JUDGMENT	2
OPINION	2
ORDER	11
OPINION (4th Cir.)	12
ORDER (4th Cir.)	20

Mandate

* * *

And whereas, this Court having on February 28, 1957, entered its judgment in the above entitled cause reversing the judgment of the said District Court appealed from insofar as it gives judgment against defendants; and the Supreme Court of the United States having on May 26, 1958, entered its judgment reversing the judgment of this Court and remanding the cause to this Court for further proceedings not inconsistent with the opinion of the Supreme Court, and the said cause having at the October term, 1958, been argued by counsel:

It is now here ordered by this Court that the judgment of this Court, entered in this cause on February 28, 1957, be, and the same is hereby, set aside and held for naught; and that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in accordance with the opinion of the Court filed herein.

January 23, 1959.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

You, therefore, are hereby commanded that such further proceedings be had in said cause by way of execution, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable EARL WARREN, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and fifty-nine.

No costs adjudged.

(s) R. M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

[Caption Omitted.]

Motion by Defendants to Vacate Judgment

Defendants, by counsel, pursuant to rule 60(b)(6) move this Court to vacate its judgment herein dated July 31, 1956, on the ground that the enforcement of such judgment will cause extreme hardship and injustice and that the judgment should be vacated in the exercise of a sound discretion by this court.

[Signatures omitted.]

* * *

In the United States District Court for the Eastern District of Virginia, Richmond Division

Civil Action No. 1841

UNITED STATES *v.* CATO BROTHERS, INCORPORATED

Opinion

This proceeding has a somewhat lengthy history. The facts may be briefly stated.

On October 28, 1953, the United States (hereinafter referred to as the Government) filed a complaint which was amended on October 1, 1954. In substance, the Government alleges that during the 1948 crop year the defendants, who were cotton dealers and ginners at Emporia, Virginia, violated what is referred to as the False Claims Act (31 U. S. C. A. 231), in connection with the 1948 Cotton Loan Program. Specifically, under that program the producer of cotton was able to obtain a loan by tendering a note and agreement, listing the warehouse receipt numbers and description of the cotton and pledging such receipt as security for the loan. These documents contained representations by the person executing the same to the effect that he had

produced the cotton and that the benefits of the loan had not been transferred to any other party. The defendant, Cato Brothers, Incorporated, was authorized by the Commodity Credit Corporation, an agency of the Government (hereinafter referred to as C.C.C.), to make loans to producers of cotton upon tender by the producers of such documents. Defendants would then be reimbursed by C.C.C. During the regular course of business the defendants (consisting of the corporation and certain individuals), instead of making loans to certain producers of cotton, purchased the cotton, paying therefor the current market price. They then obtained from such producers their signatures to notes in blank. Thereupon, the defendants filled in and submitted the notes and warehouse receipts to C.C.C. and obtained the respective amounts which would have been paid to the producers. Those amounts were substantially the current price. Thus, the producer sold his cotton to the defendants and received the current market price therefor. The defendants, in turn, received from C.C.C. the current market price in the form of a loan, but they stood to receive such benefits as might accrue in event the price of cotton advanced. The defenadnt filed an answer and a counterclaim, which counterclaim was based upon a transaction concerning the sale of certain Crimson Clover seed, in connection with which the plaintiff was indebted to the defendants in the sum of $1,150.24, with interest from January 1, 1953. The correctness of this claim was not seriously contested but the reason for withholding payment was due to the controversy concerning the cotton loan notes.

There was an extended hearing, as a result of which this Court found that the defendants were jointly and severally liable in the amount of $60,000.00, representing a penalty of $2,000.00 for each of thirty letters transmitting notes;

and that the defendants were entitled to recover the amount demanded in the counterclaim.

During the hearing it developed that when the transaction was brought to the attention of the defendants, an offer was made by them to repurchase the notes for such amount as would save the Government harmless so far as possible loss was concerned. That offer was refused. It is not clear why the Government representatives refused to accept reimbursement. It was further shown by the evidence that after the loans were made there was a substantial increase in the price of cotton, which was attributed to the hostilities in Korea. Whatever may have been the underlying reasons, the offer of the defendants was rejected and the cotton was held by the C.C.C. over an extended period of time, during which a profit would have been realized had the Government representatives disposed of the cotton on the market, or, in the alternative suggested by the defendants, the Government would have been saved any possible loss from the transaction by the redemption of the notes by the defendants. With the passage of time and inaction on the part of the Government representatives, the price of cotton declined and eventually there was a net loss to the Government of $29,930.09. I held that this was not recoverable because of the failure of C.C.C. to either sell the cotton or accept the offer of the defendants and thereby mitigate the damages. There was no error assigned as to that ruling and the judgment has now become final. In the transaction the defendants realized $8,079.10 profit, being the difference between the amounts paid by them to the producers and the loan prices received by them from C.C.C. This seems attributable to market fluctuations between the date of purchase and the submission of the notes to C.C.C. There was an additional item of $129.29, received by the defendants as interest paid by the

C.C.C. Thus there was a total profit to the defendants of $8,208.39.

When the case was before me for consideration, it was my view that the total forfeitures provided by statute represented an excessive penalty and that the remedy afforded the plaintiff should be commensurate with the profit of the defendants. However, in view of the language in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, I concluded that I was then without authority to remit any part of the forfeiture but should enter judgment in the amount of $2,000.00 for each letter of transmittal, making a total of $60,000.00. This was done.

There was an appeal to the United States Court of Appeals, Fourth Circuit, which was reported in 242 Fed. (2d) 359. From the decision of that Court certiorari was granted by the Supreme Court and under the style of *United States* v. *McVinch*, 356 U. S. 595, the Supreme Court reversed the Court of Appeals. See also *Rainwater* v. *United States*, 356 U. S. 590. Thereafter, the Court of Appeals considered the case further in view of the opinion of the Supreme Court. See 263 Fed. (2d) 697. Subsequently, the mandate from the Court of Appeals affirming the judgment of this Court was received on May 25, 1959. On July 8, 1959, the defendants filed a motion to vacate the judgment under Federal Rule of Civil Procedure 60(b)(6), on the ground that the enforcement of judgment would cause extreme hardship and injustice and that it should be vacated in the exercise of a sound discretion by this Court.

The Government questions the authority and power of this Court as the proper forum to hear the motion and assuming this Court is the proper forum asserts that it has no authority or power to vacate the judgment or any portion thereof. It is further contended that the forfeiture is not unreasonable.

The problem presented appears to be a novel one. No case directly in point has been called to my attention. In *Klapprott* v. *United State*, 335 U. S., 601, the Supreme Court discussed the power of the District Courts under *Rule 60(b)* and this is also briefly referred to by the United States Court of Appeals, Fourth Circuit in *Webb* v. *United States*, decided March 11, 1959, 264 Fed. (2d), 888. Neither opinion appears relevant. It follows that in the absence of precedent it becomes necessary to consider the case upon reason and principle.

At the outset it must be borne in mind that the judgment is for a forfeiture. While a forfeiture is civil in nature, it bears a striking resemblance to a criminal penalty. The degree of proof required in a forfeiture proceeding is a preponderance of the evidence instead of proof beyond a reasonable doubt as in a criminal case. See *Marcus* v. *Hess*, supra; *Helvering* v. *Mitchell*, 303 U. S., 391; and *United States* v. *Grannis* (4th Circuit), 172 Fed. (2d), 507. A forfeiture is also closely related to punitive damages in a civil action, the difference being that the jury or the Court determines the amount of punitive damages as shown justified by the evidence, whereas a forfeiture is fixed in amount by statute. See *Cato* v. *United States*, 263 Fed. (2d), 697, supra. In considering the scope of Rule 60(b), these principles should be kept in mind as well as the axiom that the law abhors a forfeiture, and the statement of Chief Justice Marshall in *United States* v. *Feely*, 1 Brock, 255, that "The object of a recognizance is not to enrich the treasury * * *."

Considering, first, the question raised by the Government concerning the proper forum, it is necessary to examine the rule. Upon appeal the appellate court may be in a position to exercise its discretion and certainly it has the power to review the action of the District Court in exercising discretion. I find no provision for such discretion in the appel-

late court until after the motion has been considered in the District Court. Rule 60 is contained in the "Federal Rules of Civil Procedure for the United States District Courts" and is captioned "Relief from Judgment or Order". That rule, so far as pertinent here, reads as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * *; (6) any other reason justifying relief from the operation of the judgment."

The motion is timely made. See *Klapprott* v. *United States*, supra.

Turning to what appears an analogous rule, we find in "Federal Rules of Criminal Procedure for the United States District Courts," *Rule 46*, which is captioned "Bail in Criminal Cases". *Rule 46(f)(2)* reads as follows:

> "Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

Continuing, *Rule 46(f)(4)*, reads as follows:

> "Remission. After entry of such judgment (for enforcement of forfeiture of bail bond), the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision."

The rule then proceeds to provide for exoneration of the obligors and release of bail. When the nature of the penalties are considered, it would seem that a situation such as the one before the Court clearly falls within the provisions of 60(b)(6) by vesting in the District Courts the power

to apply equitable principles consistent with the ends of justice to the enforcement of a final judgment based upon a statutory forfeiture. A further analogy may be found in the power of the District Court in remitting forfeitures in libel cases. The more familiar type of such cases involves the forfeiture of motor vehicles engaged in violating the Internal Revenue laws. From a consideration of the language of the rules it would seem that the analogy to the last mentioned type of proceeding is somewhat close, especially as it involves procedure. In libel proceedings the guilt or innocence of the vehicle is first determined and it is only after such determination or judgment that the Court is authorized to remit the forfeiture. In the instant case *Rule 60(b)* deals with a *final judgment*. The District Court was without power to remit or reduce the forfeiture before final judgment. The rule provides for motion before the District Court after final judgment. That is precisely the situation here. It follows that the District Court is the proper forum to entertain the motion. The motion was made within proper time and the District Court has the power to grant relief upon such terms as are just and for any reason justifying relief from the operation of the judgment.

As before indicated, it was my conclusion after the hearing that the defendants were in violation of the "False Claims Act". That question has been determined. It was also my opinion as before indicated that the circumstances of the case were such that the enforcement of the forfeiture in the amount fixed by statute would penalize the defendants far beyond the degree commensurate with their culpability. At my request counsel sought but were unable to point to authority under which I could reduce the forfeiture. While *Rule 60(b)* was not called to my attention, it would appear that at that time the rule was not applicable since final judgment had not been entered. The appellate proceeding

followed, during which time the District Court had no jurisdiction. It is now back before the District Court on motion properly made. See *Sprague* v. *Ticonic Bank*, 307 U. S., 161, at 169, 170.

This brings us to a consideration of the merits of the motion. Unless the defendants are relieved of a portion of the forfeiture, they will be penalized far beyond what would be reasonable. As stated, they realized a profit. In *Marcus* v. *Hess*, supra, the Supreme Court expressed the opinion that the statute is remedial and not criminal. The Court also indicated the view that the remedy should be commensurate with the gain. We are also again reminded of the principle quoted previously to the effect that the object of the recognizance is not to enrich the treasury. The same observations apply to a forfeiture. In considering an application for relief, these principles should be borne in mind and the situation of the individual as well as that of the Government is to be considered. Had the Government elected to proceed criminally in this case, the burden upon it would have been to prove guilt beyond a reasonable doubt. Had a conviction followed, the Court would have determined the penalty. Since it elected to proceed civilly, it was required to prove its case only by a preponderance of the evidence and the amount of forfeiture was fixed by statute. As the trier of facts in this case, I was conscious of this rule of evidence and determined the factual issues accordingly. In undertaking to reach a determination of what the ends of justice require, it is my conclusion that the defendants should be relieved of the final judgment upon condition that they pay the sum of $20,000.00 in satisfaction of the judgment. In reaching this amount I have in mind the profit of $8,208.39 realized and the further fact disclosed by the record that this litigation has been protracted and of necessity costly. The payment of this amount, coupled with normal expenses incident

to representation of counsel, court costs, etc., would constitute a penalty fully commensurate with the actions of the defendants and the gains realized by them.

I am not unmindful of the fact that C.C.C. actually sustained a substantial loss. I realized that in addition to the principle referred to in *Marcus* v. *Hess*, supra, that the remedy should be commensurate with the gain, there is another principle equally meritorious that the Government should be reimbursed for losses sustained by the actions of a wrongdoer. This is a sound principle commonly observed in remitting portions of the forfeiture in criminal bail bond cases. Under ordinary circumstances it should be followed here. I am also aware of the fact that the Government should not be penalized for the actions of its employees. However, considering the facts of this case, it is not believed that the defendants should be penalized to the extent of saving the Government harmless. C.C.C. could have either (1) sold the cotton at a profit, or (2) accepted from the defendants repayment of the amount advanced by C.C.C. as loans. Were this litigation between private individuals, the well-known principle concerning mitigation of damages would preclude the plaintiff from being heard to assert any claim for this loss. With the option of selling the cotton at a profit or of accepting from the defendants the amount advanced and thereby precluding possibility of loss, although urged to act, they refused to do either. In criminal prosecutions restitution does not necessarily await the trial. There was no reason for a different rule here.

From some of the language in *Toepleman* v. *United States*, considered with *Cato* v. *United States*, 263 Fed. (2d) 697, *supra*, it might appear that my failure to award damages for the loss in the first instance was erroneous. However, I am not familiar with the details of the Toepleman case upon this point and it is not now an issue in this case. In.

any event, it is to be remembered that at this stage I am not fixing the legal rights and obligations of the parties to the controversy prior to judgment. I am now undertaking to determine what the ends of justice require with respect to the enforcement of a final judgment. There is a striking similarity to the function of the Court in determining the appropriate fine or other penalty to be imposed upon one found guilty of violating a penal statute. In both situations the object to be attained is the fixing of a penalty commensurate with the offense and consistent with the ends of justice. In so doing the situations of both the defendants and the Government must be examined in the light of all the circumstances. While the defendants should not be relieved of the consequences of their acts they should not be penalized for acts of employees of the Government. If a proper way is open to save to the delinquent his pound of flesh that way should be followed, unless the intersts of the public demand the application of a harsher rule. The facts of this case, as shown by the record, do not demand a greater penalty than that indicated.

An order in conformity with the views here expressed will be entered upon presentation.

(SGD.) STERLING HUTCHESON
United States District Judge.

JULY 24, 1959.

Order

The defendants, having moved for an order vacating the judgment against them herein, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and the court having heard argument of counsel and rendered its opinion dated July 24, 1959, it is hereby

Ordered that the defendants, and each of them, be, and they hereby are, relieved of the operation of the final judgment order against them entered herein on July 31, 1959, upon condition that they, or any one or more of them, pay the sum of $20,000.00 to the plaintiff.

/s/ STERLING HUTCHESON

JULY 31, 1959.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7967

United States of America,
Appellant,

versus

Cato Brothers, Inc.,
Wilfred R. Cato, William R. Cato, and
Magie L. Dunn (nee: Magie L. Stone),
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
STERLING HUTCHESON, DISTRICT JUDGE.

(Argued November 12, 1959.
Decided December 14, 1959.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

SOPER, Circuit Judge:

This appeal is taken from an order of the District Judge whereby the defendants were released from the obligation of a judgment to pay to the United States the sum of $50,000 on condition that they pay to the United States the sum of $20,000. The judgment for $50,000 had previously been affirmed by this court and the United States appeals on the ground that the District Judge had no power to amend the judgment in this way.

On July 31, 1950, the District Court awarded the United States $2,000 upon each of thirty false claims submitted by the defendants to the Commodity Credit Corporation whereby they obtained loans on cotton in thirty separate transactions and gave notes which contained the false representation that the notes were made by the producers of the cotton. The suit was based on the civil False Claims Act, 31 U. S. C. § 231, which provides in effect that any person not in the military or naval service who makes any claim for payment upon or against the Government of the United States or any department or officer thereof, knowing the claim to be false, fictitious or fraudulent, shall forfeit and pay to the United States the sum of $2,000 and, in addition, double the amount of damages which the United States may have sustained by reason of the doing of such act. The judgment of the District Court for $2,000 on each of the thirty false claims was reversed by this court on appeal (247 F. 2d 359) on the ground that a claim against the Commodity Credit Corporation is not a claim against the United States since a government corporation is not a department of the government. In reaching this conclusion, we were influenced by the legislative history which showed that the criminal False Claims Act, 18 U. S. C. § 287, which was originally directed against false claims against or upon

the Government of the United States or any department or officer thereof, had been specifically amended to add to this list "any corporation in which the United States of America is a stockholder", whereas the civil False Claims Act had not been so amended. The Supreme Court, however, reversed this holding, sub nomine *United States* v. *McNinch*, 356 U. S. 595, a companion case considered by us together with the case at bar. The Supreme Court held that a claim against the Commodity Credit Corporation is a claim against the Government of the United States or any department or officer thereof within the meaning of the provisions of the civil False Claims Act.

On remand, the case was reargued in this court, *Cato Bros. et al.* v. *United States*, 263 F. 2d 697, and additional contentions on behalf of the defendants were considered. These contentions were based on the ground that the United States had not sustained any calculable damages by reason of the actions of the defendants and therefor the imposition of such a plurality of penalties, that is, thirty in the pending case and eighty-two in the companion *Tocpleman* case, was unconstitutional. We rejected the contention on the ground that damages are always suffered by the United States when a false claim is presented and that the Government may protect itself against this eventuality even though the damages are not nicely ascertainable, so that even when the penalty is multiplied by a plurality of impositions, the total amount of the forfeiture can not be justly regarded as a taking without just cause or due process. Accordingly the judgment of the District Court in favor of the United States was affirmed in *Cato Bros. et al.* v. *United States*, 263 F. 2d 697, and subsequently a petition for writ of certiorari was denied by the Supreme Court, 359 U. S. 989.

Ordinarily this would have been an end of the litigation,

but when the case was returned to the District Court the defendants reopened the controversy by moving to vacate the judgment which had just been affirmed. The motion was based on Rule 60 of the Federal Rules of Civil Procedure, which empowers the District Court (a) to correct clerical mistakes in judgments and (b) to relieve a party from a final judgment for the following reasons amongst other: (1) mistake, inadvertence or excusable neglect, (2) newly discovered evidence, (3) fraud or misconduct of the adverse party, (4) invalidity, (5) satisfaction or discharge, or (6) "any other reason justifying relief from the operation of the judgment".

The District Judge realized that the problem presented by the motion was a novel one and that no case directly in point could be found; but he finally reached the conclusion that discretion to modify the judgment by reducing the amount thereof from $60,000 to $20,000 in the interest of justice was conferred upon him by the power granted in subsection (6) of Rule 60(b) quoted above.

In his opinion the judge called attention to the general principle that the law abhors a forfeiture; and he found analogies to the situation in the case at bar in the power conferred upon the court by Rule 46(f)(2), (4) of the Federal Rules of Criminal Procedure to set aside a bail forfeiture in whole or in part, if justice does not require an enforcement of the forfeiture; and also in the power conferred upon the court by 18 U. S. C. § 3617 to remit forfeitures in libel cases instituted by the United States for the forfeiture of vessels or other conveyances used in violation of the Internal Revenue laws. See *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 528; *United States* v. *One Ford Coach*, 307 U. S. 219.

Coming to the merits of the case, the judge expressed the opinion that "the enforcement of the forfeiture would

penalize the defendants far beyond the degree commensurate with their culpability"; and he found support for his views in *United States ex rel Marcus* v. *Hess*, 317 U. S. 537, where he said that the Supreme Court expressed the opinion that the statute is remedial and not criminal and indicated the view that the remedy should be commensurate with the gain. In reaching his conclusion that the amount of the forfeiture should be reduced to $20,000, the judge took into consideration that the defendants had received a profit of $8,203.39 but, on the other hand, had been subjected to the expense of a prolonged and costly litigation in the representation of counsel, court costs and so forth, so that the payment of $20,000 would constitute a penalty "fully commensurate with the actions of the defendants and the gains realized by them". He also concluded that the defendants should not be penalized to the extent of saving the Government harmless from the losses which it had incurred by the failure of the Commodity Credit Corporation either to sell the cotton for a profit or to accept repayment by the defendants of the amount of the loans. In short, the judge construed Rule 60(b)(6) as empowering him to take into consideration all of the circumstances of the case and to impose such a penalty as he thought just under the circumstances, free from the specific provisions of the statute which prescribe a penalty of $2,000 for each false claim presented to the Government.

There can be no doubt that the District Judge gave careful and conscientious consideration to the circumstances of the case in order to do justice between the parties as he saw it; but we can not find any support for the theory that he was clothed with power by Rule 60 to substitute his judgment of what was the appropriate penalty for the wrongful conduct of the defendants in place of the penalty

prescribed by the act of Congress. The analogies to the remission of forfeitures incurred by reason of failure to comply with conditions of bail bonds or in the confiscation of property used in violation of the Internal Revenue laws are not helpful because the relevant statutes expressly confer discretion upon the district judge in these cases to revoke or modify the forfeitures. Nor does *United States ex rel Marcus* v. *Hess*, supra, suggest in any way that the district judge has the power to mitigate what appear to him to be the acerbities of the statute. In that case the Court discussed the contention that persons, who had presented false claims against the United States and had been fined $54,000 on a plea of nolo contendre to the crime of conspiring to defraud the United States (18 U. S. C. §286), were subjected to double jeopardy when they were also ordered to pay the sum of $203,000 for double damages and $112,000 for fifty-six violations in a proceeding under the civil false claims statute. In overruling the contention, the Court pointed out that the required payment of a lump sum and double damages would do no more than afford the Government complete indemnity for the injury done it (page 549) and that, in any case, Congress might have provided, as it did in the antitrust laws, for the recovery of three-fold damages (page 550); and finally, the Court said (page 551): "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be completely whole". We have here no intimation that the judge may disregard or modify the statutory penalty if it seems to him to be too severe.

It has never been held and it is not now contended that a federal judge, in a case under a federal statute which

prescribes penalties for wrongful conduct, has the power, after violation of the statute has been established, to impose any penalty other than that named in the law; and it would be contrary to reason to hold that after a lawful judgment has been entered in accordance with the statute the judge is then endowed by the rule with the extraordinary power, which he did not previously possess, to disregard the will of Congress.

The conclusive answer to the problem, moreover, is that if the rule were given such an interpretation it would be invalid as beyond the power of the Supreme Court of the United States. The act of Congress which granted to the Supreme Court the power to prescribe rules of civil procedure for the district courts, 28 U. S. C. § 2072, expressly provided that such rules shall not abridge, enlarge or modify any substantial right; and there can be no doubt that a rule which conferred upon the district judge the power to disregard an act of Congress would not only impair the legislative powers granted to Congress by the Constitution but the right and duty of the Government in the exercise of its executive powers to enforce the acts of Congress. We are dealing here not merely with the incidental modification of substantial rights that sometimes occurs in the enforcement of rule of practice and procedure, but with the fundamental rights of parties which may be enforced but may not be modified by the rules of procedure. See *Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438, 444-45; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1; *United States* v. *Sherwood*, 312 U. S. 584, 590; *Hart* v. *Knox County, Tenn.*, 6 Cir., 171 F. 2d 45.

Full scope can be given to subsection (6) of Rule 60(b) by applying it in a liberal spirit in accordance with the principle of *eiusdem generis*, to situations in the same gen-

eral class as those enumerated in the five preceding subsections. This was done in *Klopprott* v. *United States*, 335 U. S. 601, where a default judgment setting aside an order admitting Klopprott to citizenship was vacated under the power given to the court in subsection (6) of Rule 60(b), although he had not filed his motion to vacate the judgment within the time prescribed by the rule in cases of excusable neglect. The Court was of the opinion that he was rendered well-nigh powerless by confinement in prison and other circumstances so that his default was caused by the extraordinary circumstances of his disability rather than merely by excusable neglect, and that he was entitled to relief under the general terms of subsection (6) for which no time limitation was prescribed. In effect, the Court held that subsection (6) should not be limited to relief ordinarily allowable under common-law practice but should be invoked whenever such action was appropriate to accomplish justice. In like manner, relief was granted from a judgment in *Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir., 199 F. 2d 242; and liberal scope has been given to subsection (6) in striking default judgments in such cases as *Patapoff* v. *Vollsted's, Inc.*, 9 Cir., 267 F. 2d 863.

In general, relief from judgments has been given under subsection (6) in cases where the judgment was obtained by the improper conduct of the party in whose favor it was rendered or resulted from the excusable default of the party against whom it was directed under circumstances not covered by subsections (1) to (5) which, in the opinion of the court, required the application of subsection (6) in order that the case be tried on its merits and justice be done; but in these instances the substantial rights of the parties in the matter in controversy were not affected. See 3 Barron and Holtzoff, *Federal Practice and Procedure*, c 11, §1329, p. 417 et seq.

Since the alteration of the judgment in the pending case was not authorized by the rule, the District Judge violated the principle that a lower court has no power or authority to deviate from the mandate issued by an appellate court but is bound thereby and can not reopen questions which the mandate lays to rest, *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304. The judgment of the District Court will therefore be reversed and the case remanded with direction to reinstate the prior judgment in accordance with the previous mandate of this court.

Reversed and Remanded.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7967

UNITED STATES OF AMERICA

v.

CATO BROS., INCORPORATED

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, It is now ordered and adjudged by the Court that the judgment from said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the United States District Court for the Eastern District of Virginia at Richmond, with direction to

reinstate the prior judgment in accordance with the previous mandate of this Court, consistent with the opinion of the Court stated herein.

Filed December 14, 1959
R. M. F. Williams, Jr., Clerk.

(s) Simon E. Sobeloff
Chief Judge, Fourth Circuit

(s) Morris A. Soper
United States Circuit Judge

(s) Roszel C. Thomsen
United States District Judge